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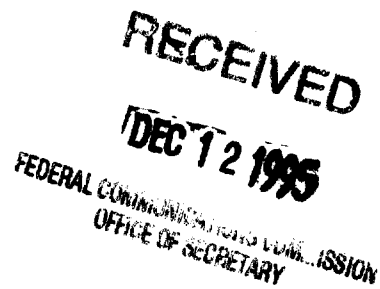
December 12, 1995



Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

RE: EX PARTE: CC Docket No. 94-54

Dear Mr. Caton:

This letter shall serve as notification that, on this day, Andre Lachance, counsel for GTE Mobilnet, and the undersigned met with Michael Wack and Jeff Steinberg of the Wireless Telecommunications Bureau-Policy Division. The purpose of the meeting was to discuss GTE's position on resale issues as reflected in its comments and reply comments previously filed in the above-referenced proceeding, and as further discussed in the attached ex parte presentation.

Please include a copy of this notification, and the attached presentation, in the record of this proceeding in accordance with the Commission's rules concerning ex parte communications.

Questions concerning this matter should be directed to the undersigned.

Sincerely,

Carol L. Bjelland

Attachment

C. M. Wack
J. Steinberg

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List ABCDE

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December 7, 1995

Barbara Esbin
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Washington, D.C. 20554

Re: Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, *Ex Parte* Presentation

Dear Ms. Esbin:

On October 30, 1995, Carol Bjelland of GTE Service Corporation and Chris Carter and Mike Mott of GTE Mobilnet met with you to discuss issues relating to resale obligations for commercial mobile radio service ("CMRS") providers. In the course of discussing two open issues raised in GTE's comments and reply comments -- resale limitations to protect proprietary technology and language to address compensation for stranded or obsolete investment -- GTE was invited to provide the Commission with more detail. To that end, this letter analyzes the policy and legal underpinnings of the Commission's resale policy, and proposes language on resale that addresses GTE's concerns. In accordance with the Commission's *Ex Parte* Rules, two copies of this letter are being furnished to the Secretary of the Commission under separate cover for inclusion in the record of the above-referenced proceeding.

As you know, Commission Rules prohibit cellular licensees from restricting resale in most circumstances.[1] In the above-referenced proceeding, the FCC has proposed applying a similar resale requirement to CMRS providers.[2] The

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[1] Cellular licensees may, however, apply resale restrictions to licensees of cellular systems on the other channel block in their markets after the five year build-out period for licensees on the other channel block has expired. 47 C.F.R. § 22.901(e).

[2] Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, *Second Notice of Proposed Rulemaking*, CC Docket No. 94-54, FCC 95-149 (released April 20, 1995) at 42-47 ("CMRS Resale SNPRM").

CMRS marketplace is growing increasingly competitive. In this environment, GTE believes that it is critical that the Commission understand the potential effects its resale policy will have on competition and begin to define the scope of the resale requirement.

Background

The FCC first adopted its resale policy in the 1976 *Resale and Shared Use* decision.[3] There, the Commission found that tariff provisions restricting the resale and shared use of interstate private line services were unjust and unreasonable in violation of section 201(b) of the Communications Act ("Act"), and unreasonably discriminatory in violation of section 202(a) of the Act. The Commission found that resale restrictions violate section 201(b) because such provisions unreasonably restricted the use of a common carrier service. Citing the *Hush-A-Phone* and *Carterfone* decisions,[4] the Commission stated that a carrier may not restrict a right to use the carrier's services and facilities in ways that which are privately beneficial without being publicly detrimental. The Commission ultimately concluded that it expected the public to privately benefit from greater availability of common carrier services and facilities and that those benefits outweighed any possible adverse impact on the using public.[5]

With respect to section 202(a), the Commission found that denial of service to intermediaries was discriminatory, the only question to be answered was whether such discrimination was reasonable under the Act. Relying in part on Interstate Commerce Act precedent, the Commission ruled that the discrimination was not justified. In particular, the FCC stated that the possibility that resale would lead to potential revenue losses or rate structure changes for the underlying carriers does not "automatically" justify a denial of service to intermediaries.[6] Moreover, the FCC found that even if a carrier could make a case that forced resale of a volume discounted offering would result in pricing changes by the carrier to eliminate the volume discount, the continued availability of the volume discount is not as important to the public as are the benefits resulting from resale and sharing.[7]

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[3] Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, *Report and Order*, Docket No. 20097, 60 FCC 2d 261 (1976), *recon.* 62 F.C.C. 588, *aff'd sub nom.* American Telephone and Telegraph Co. v. FCC, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978).

[4] Hush-A-Phone Corporation v. United States, 238 F.2d 266 (D.C. Cir. 1956); Use of the Carterfone Device in Message Toll Telephone Service, 13 FCC 2d 420 (1968).

[5] 60 FCC 2d at 280-283.

[6] Id. at 283-284.

[7] Id. at 286-289.

The benefits identified by the Commission as attributable to resale and sharing of common carrier services included: (1) the provision of communications service at rates more closely related to costs; (2) better management of communications networks and the provision of management expertise by users and intermediaries to the carriers; (3) the avoidance of waste of communications capacity; and (4) the creation of additional incentives for research and development of ancillary devices to be used with transmission lines.[8]

Since 1976, the Commission has extended its resale policy to other services. In 1980, for example, the Commission adopted a prohibition against tariff provisions that unreasonably restrict resale of switched services.[9] In 1981, the Commission decided, pursuant to its licensing authority set forth in section 309 of the Act, to condition radio licenses such that no restrictions on resale and shared use of cellular services would be permitted.[10]

In 1992, the Commission established an exception to its cellular resale policy, holding that a cellular carrier may lawfully deny resale to a fully-operational facilities-based competitor in the same market after the competitor's five-year fill-in period.[11] The Commission reasoned that this limited exception to its cellular resale policy would not violate section 201(b) of the Act because continued mandatory resale to facilities-based competitors may have the effect of inhibiting facilities-based competition by encouraging a carrier to rely on its competitor's facilities.[12] The Commission found that the facilities-based carrier exception did not violate section 202(a) of the Act because allowing carriers to discriminate against facilities-based competitors is justified by the need to promote interbrand competition and promote more efficient use of cellular radio spectrum.[13]

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8 60 FCC 2d at 265 (para. 7), 298-303.

9 Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, *Report and Order*, 83 FCC 2d 167 (1980).

10 An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, *Report and Order*, 86 FCC 2d 469, 510-511 (1981), *modified*, 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982) *appeal dismissed sub nom.* United States v. FCC, No. 82-1526 (D.C. Cir. March 3, 1983).

11 Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies, *Notice of Proposed Rulemaking and Order*, 6 FCC Rcd 1719 (1991); *Report and Order*, 7 FCC Rcd 4006 (1992).

12 7 FCC Rcd at 4008 (para. 15).

13 Id. at 4008-4009 (para. 16).

More recently, in the context of its Docket 94-54 proceeding, the Commission has proposed to extend the existing resale obligation on cellular providers to commercial mobile radio service ("CMRS") providers, unless there is a showing that resale would not be technically feasible or economically reasonable for a class of CMRS licensees.[14]

Discussion:

In the above-captioned proceeding, GTE requested that (1) the resale requirement should not apply to services dependent on proprietary technology; and (2) facilities-based CMRS providers reselling services to other CMRS licensees may need to impose different terms and conditions in order to protect against underutilized and obsolete investment. In order to clarify and better define its position, GTE now asks that the Commission adopt specific language to protect these concerns.

1. Bundling CMRS with Proprietary Equipment or Technology

GTE asks the Commission to amend its rules in the following manner:[15]

> Amend section 22.901(e) by placing a period after the word "service" and making the remainder of the current rule subsection (1). Then add subsection (2) which would read:
>
> (2) It shall not be an unreasonable act or practice, or unjust or unreasonable discrimination, or a violation of this section of the Commission's Rules for a cellular system licensee to deny resale of an offering that bundles commercial mobile radio service and proprietary equipment or technology; provided that the cellular system licensee can demonstrate, either by a valid patent, existing patent-pending application, or other means, that the bundled offering employs proprietary equipment or technology.
>
> Amend section 22.99 of the Commission's Rules by adding the following definition:

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[14] CMRS Resale SNPRM at 42-47.

[15] Because of the manner in which the Commission's Rules are set forth for various CMRS, it was impractical to write a rule provision applying to all CMRS. GTE therefore wrote the rule for insertion in Part 22, but asks the Commission to adopt the same provisions in rule parts pertaining to other CMRS to which the resale obligation is extended. The Commission would, of course, need to substitute the appropriate term in the place of "cellular system licensee."

> Proprietary Equipment or Technology. Equipment or technology that is covered by an issued patent, a pending patent application, or copyright, or includes Trade Secrets or other information not generally available to the public and owned by, licensed to or otherwise belonging to a cellular system licensee.

GTE believes this rule is necessary to preserve the incentive for CMRS providers to develop services and technologies that may enable the carrier to distinguish itself from other carriers in a competitive marketplace. In the near future, each geographic CMRS market will soon have as many as nine facilities-based competitors (2 cellular, 6 PCS, and 1 enhanced specialized mobile radio). Competition among CMRS providers, barring unnecessary restrictions, will exist in all facets of the wireless business, including price, customer service, signal quality, geographic footprint, and service offerings.

GTE strongly believes that as the market becomes increasingly competitive, the companies that succeed will be those that differentiate themselves on the basis of superior service offerings. Toward that end, GTE has invested considerable resources in developing new technologies that will facilitate innovative new service offerings. GTE plans to (and in some cases already does) offer these innovative new services through packages which bundle proprietary equipment or technology with the underlying commercial mobile radio service.

Requiring carriers to make such offerings available to competitors through resale ultimately would stifle these competitive innovations. First, the carrier would lose the competitive advantage attributable to the innovation. Second, carriers' incentive to continue to make the investment to develop and implement new technologies would be substantially diminished.

GTE believes the proposed rule is lawful. As the Commission recognized in its 1992 decision creating a limited exception to the cellular resale requirement for offerings to facilities-based carriers, the resale requirement does not *per se* -- and should not -- apply in all circumstances. As noted above, the resale requirement is based on section 201(b) and 202(a) of the Act. If it can be shown that application of the unlimited resale requirement would not violate those provisions, an exception to the resale requirement would be warranted.

With respect to section 201(b), GTE believes that a limited resale exception for offerings bundling commercial mobile radio service with proprietary equipment or technology would sustain CMRS providers' incentive to develop new services and technologies without significantly diminishing the benefits of resale. One of the benefits of resale identified by the Commission is the creation of additional incentives for research and development of ancillary devices to be used with transmission lines. As GTE has demonstrated above, however, application of the resale requirement to offerings bundling proprietary equipment or technology actually diminishes incentives to develop new technologies and services and --

impedes competition for new products and services. The proposed rule would benefit the public by preserving the incentive to innovate.

GTE does not believe any of the other identified benefits of the resale policy would be significantly diminished. These benefits stem from the notion that resellers would provide additional competitive choices in markets which, when mandatory resale was adopted, had limited competitive alternatives. Thus, resellers, the Commission found, would help move prices toward cost, create new services and management capabilities, and fill excess capacity. GTE submits that while these goals are still important, given the number of CMRS providers that will soon -- and in some cases have already begun to --compete in the marketplace, a limited exception to the resale requirement is not likely to significantly diminish customer's competitive choices. Accordingly, on balance, GTE believes that a resale exception for offerings bundling commercial mobile radio service with proprietary equipment and technology would not constitute an unreasonable practice under section 201(b) of the Act.

Nor will the proposed rule violate section 202(a). As the Commission found in its 1992 order, the limited discrimination that would result from the proposed rule would be justified by a number of factors. The proposed rule will promote interbrand competition by encouraging each service provider to develop new technologies and equipment that differentiate each carrier's brand of service from that of their competitors. As such, the proposed rule will also help to promote the development of new services and technologies by all entities, including resellers. Finally, although resellers would possibly be foreclosed from selling other carrier's proprietary offerings, nothing in the proposed rule will prevent resellers from obtaining resale service at nondiscriminatory rates. Thus, the proposed rule will not prevent resellers from competing in the market. Accordingly, GTE believes that the proposed rule would not unreasonably discriminate against CMRS resellers.

2. Resale to Facilities-Based Carriers

GTE asks the Commission to include in the text of any order adopting a resale requirement for CMRS providers language which states that:

> It shall not be a *per se* unreasonable act or practice, or unjust or unreasonable discrimination, or a violation of section 22.901(e) of the Commission's Rules for a CMRS provider to negotiate in any resale service contract with other CMRS licensees terms and conditions reasonably designed to ensure that equipment or facilities investment attributable to providing service to other CMRS licensees is recouped under the contract.

As GTE argued in its initial and reply comments in response to the Commission's *Second Notice of Proposed Rulemaking*, underlying facilities-based providers will

incur costs to construct facilities or provide equipment in order to meet the resale needs of their facilities-based competitors in the same market. Once these competitors construct their own facilities and remove their traffic, the underlying carrier will be left with both underutilized and obsolete analog investment attributable to resale to those facilities-based carriers. These effects are especially significant considering the ongoing change from analog to digital technology. The Commission's resale policy must give underlying carriers the flexibility to negotiate terms and conditions that account for both underutilized and obsolete analog investment attributable to resale to facilities-based carriers.

GTE believes that contract terms and conditions designed to recover such costs are lawful under the Commission's resale policy and under sections 201 and 202 of the Communications Act. GTE's request is consistent with past Commission decisions upholding limited resale restrictions. Previously, the Commission has found that some contract provisions, although they restrict resale, are both reasonable and necessary to promote network stability. Thus, for example, the Commission found that requiring a facilities-based reseller to purchase a certain number or phone numbers and to agree to take service for a minimum number of months were necessary in order to enable the underlying carrier to manage its system more efficiently by reducting administrative costs that would be imposed by with excessive instability in the reseller market.[16] GTE believes that the contemplated contract provisions will provide GTE and other CMRS providers with a measure of stability in dealing with facilities-based resellers that will better enable carriers to invest in network facilities and equipment to meet customer needs.

GTE does not believe that its proposals presents any section 201(b) problems. First, the contract terms contemplated would not prevent resellers from obtaining service at reasonable rates, terms and conditions. The proposed language merely contemplates including contract terms that will enable the underlying carrier to recover all reasonable costs attributable to providing service to the reseller. Second, all such contract terms would be subject to Commission review to ensure that no particular term is unreasonable.

With respect to section 202(a), as GTE argued in its reply comments, the Commission has previously recognized that differences in the cost of providing service or in the circumstances and conditions attendant an agreement with different customers can lawfully justify different contract terms and conditions, and do not necessarily contravene the nondiscrimination provisions of the Act. Thus, in the *Interexchange Proceeding*, the Commission found that carriers may lawfully offer individualized contract-based rates to customers, and that

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[16] Application of New York SMSA Limited Partnership for License to Cover Construction Permit (in part) to Operate on Frequency Block B in the Domestic Public Cellular Radio Telecommunications Service to Serve the New York, New York Modified SMSA, *Memorandum Opinion and Order*, FCC 85-310, 58 RR 2d (P&F) 525, 529 (1985).

differences in the rates, terms and conditions offered to different customers can be justified by cost differences and other factors.[17] The Commission has also previously opined that differences in the projected length and extent of service justify different terms and conditions of a service offering, and thus do not contravene the nondiscrimination provisions of the Act.[18]

GTE's proposed language would recognize that carriers providing resale capacity to FCC-licensed CMRS carriers may lawfully recover from such carriers costs reasonably attributable to providing that service. Because any such terms would be reasonable and not unreasonably discriminatory, the Commission should grant GTE's request.

Respectfully submitted,

André J. Lachance

Andre J. Lachance
Attorney for GTE Mobilnet

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17 Competition in the Interstate Interchange Marketplace, *Report and Order,* CC Docket No. 90-132, 6 FCC Rcd 5880, 5902-5903 and n.216 (1991). The Commission later affirmed this view in the *Tariff 12* proceeding. AT&T Communications Revisions to Tariff F.C.C. No. 12, *Memorandum Opinion and Order on Remand,* CC Docket No. 87-568, 6 FCC Rcd 7039, 7047-7049 (1991). The Commission's analysis of the lawfulness of contract-based rates was later affirmed by the United States Court of Appeals for the District of Columbia Circuit. Competitive Telecommunications Association v. FCC, 998 F.2d 1058, 1063-1064 (D.C. Cir. 1993).

18 *See, e.g.,* ACC Long Distance Corp. v. Yankee Microwave, Inc., *Memorandum Opinion and Order,* 71 Rad.Reg.2d 1330 (Common Carrier Bureau 1993) (upholding a contract of six-year duration that reduced rates by 40 percent); Private Line Rate Structure and Volume Discount Practices, *Report and Order,* 97 FCC 2d 923 (1984) (finding volume discounts permissible).